In *Bonner* v. *Welborn*, the plaintiff was the owner of some medicinal springs, much resorted to by invalids; the defendant erected a mill-dam and pond in the vicinity, which through the apprehension of sickness by visitors detained them from visiting the place, whereby the profits of the establishment were reduced nearly $20,000 in two years, and plaintiff was permitted to recover.

But that such actions may be maintained on the broader ground of direct injury to the plaintiff property or business, by a wrongful act of the defendant, whatever be the number of persons injured, is clearly established by a long series of adjudications. See *Soltau* v. *De Held*, 2 Sim. (N. S.) 133; *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608, and 11 H. L. C. 642; *Wesson* v. *Washburn Iron Co.*, 13 Allen 95; *Bamford* v. *Turnley*, 3 B. & S. 66; *Spencer* v. *London & Birmingham Railway Co.*, 8 Sim. 193; *Francis* v. *Schoellkopf*, N. Y. 152; *Greene* v. *Nunnemacher*, 36 Wis. 50.

From this review of the authorities on this vexed question, although they may not all be easily reconciled, certainly not without subtle and refined distinctions, some general principles are fairly deducible, which may be thus stated:

1st. For any act obstructing a public and common right, no private action will lie for damages of the same *kind* as those sustained by the general public, although in a much greater degree than any other person.

2d. An action will lie for peculiar damages of a different kind, though even in the smallest degree.

3d. The damages if really peculiar need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort.

4th. The fact that many others sustain an injury of exactly like kind is not a bar to individual actions in many cases of a public nuisance.

EDMUND H. BENNETT.

Supreme Court of Judicature. Court of Appeal.

THE QUEEN *v.* ORTON.

By the common law, several distinct misdemeanors of the same kind may be charged in different counts of the same indictment. The practice is different in the case of several felonies, but *semble*, even that is within the discretion of the court.

Upon conviction of several offences, whether in separate indictments or in separate counts of the same indictment, sentence upon one may be made to take effect after the expiration of the sentence on another of them.

False testimony given upon two different occasions, though the language used and the object in view were the same in both, and both were parts of the same general judicial proceeding, constitute two distinct perjuries, for which separate and cumulative sentences may be imposed.

THIS was a common-law indictment for perjury, containing two counts; one offence was alleged to have been committed before a master in chancery, and the other in open court, at a trial at law in the Court of Common Pleas at Westminster; the one was ancillary to the other, the object being the recovery of the Tichborne

estates, and the perjury in both instances consisting of a reiteration by the prisoner that he was Mr. Roger Tichborne. It was now contended that the second sentence of seven years penal servitude ought not to have been cumulative, but even if there were two distinct acts of perjury, the maximum of punishment should not have been exceeded by successive sentences.

Mr. *Benjamin*, Q. C., Mr. *Atherly Jones*, Mr. *Hederwick*, and Mr. *Russell Spratt*, appeared for the prisoner.

The Attorney-General, the Solicitor-General, and Mr. *Poland*, with Mr. *Bandmann*, for the crown.

Lord Justice JAMES.—I am of opinion that this writ of error issued improvidently. The subject is one which might be supposed to be decided by a current of authority and a course of practice which it is not open to any person in this country to disregard. The law is, and always has been, that several misdemeanors may be joined in one indictment, that is, in several counts in one indictment; that is to say, may be the subject of several distinct charges or indictments put together in one piece of parchment, but each count being in law a distinct charge or indictment upon which a man ought to be tried and convicted or acquitted, as the case may be. A practice has prevailed in cases of felonies, by which the judges, in the exercise of their power of regulating the proceedings before them, thought it right (in times when many felonies were capital), that a man should not be tried for more than one felony at the same time. But no such practice has prevailed with regard to trials for misdemeanors, though in a proper case, if the judge saw that prejudice would arise to the prisoner by compelling him to meet different charges at the same time, he would put the prosecutor to elect on which of them to proceed; which, however, would only be an exercise of his discretion, not reviewable on a writ of error. That being the law that a man might be tried at the same time for several misdemeanors, the subject of several distinct counts, there is, to my mind, no possible reason for any distinction to be drawn between such a trial and conviction on several charges on one indictment and several trials on several indictments. In the case of *Wilkes* it was certainly settled that, for several misdemeanors, the subject of distinct indictments, one tried after the other, and sentences pronounced on one after the other, it was held

by the House of Lords that one sentence of imprisonment might be passed, to take effect after the expiration of another. So the law has remained unquestioned from that time to the present, and it is too late now, after the lapse of more than a century, to attempt to dispute it, acted upon, as it has been, in hundreds and thousands of cases. The case in an American court has been relied upon, indeed, as establishing a restriction upon it (that it applied only to sentences on different indictments); and we are told it was on the authority of that case, the late attorney-general granted his *fiat* for a writ of error in the case before us. In that case it was laid down that the law does not allow of cumulative sentences being imposed on conviction for several misdemeanors charged in different counts in a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of the punishment for the particular misdemeanor. No such language is to be found in any case in English law books. Why are we to follow that decision, and put this restriction on the law hitherto laid down. I have always felt unfeigned respect for the decisions of the courts in America upon matters of law common to their jurisprudence and ours; but I must confess that I was startled by the mode in which the judges in the case cited dealt with the question. They seem to have thought it sufficient to say that the contrary view to theirs had never been laid down, and that theirs was in accordance with the English common law in 1775, at the era of the separation from this country, disregarding the dicta of our judges since then. And they treat the precedent of the sentence in the *Tichborne case* as of no authority, though that was a judgment of several judges, and theirs was only a decision of three judges overruling the opinion of three others.

[Mr. *Benjamin* stated that the lord justice was here in error, for that the judgment of the Supreme Court of New York was that of seven judges, all of whom, as the report stated at the end, concurred, including the chief justice, although he was absent at the time of the judgment.]

But upon what principle or reason did their decision rest? I am unable to discover any; and, at all events, the one suggested in argument is startling, if not shocking, for it was this: that if a man commits an offence of so grave a character that the utmost punishment allowed by law for it is too light, he is free to commit any number of offences with absolute impunity if he is tried before

the expiration of his sentence, and with comparative immunity if his trial is postponed until he has fulfilled his sentence under the first, thus giving him all the chances of escape which the lapse of time would allow. To my mind such a proposition is startling. No authority for it is to be found in English law, and there is, in my opinion, no foundation for it, and it seems to me that the judgment of the American court proceeded upon a view different from that of our courts, that different offences should not be prosecuted in the same indictment. It was objected that the sentence of penal servitude ought to have been additional to one of imprisonment; but in my view that is only if such imprisonment is adjudged, the statute giving only the power of imposing it. The main point, however, was that on this statute a sentence of fourteen years was not allowable, but only one of seven; for that it was all one perjury by the defendant in swearing he was Tichborne, and that any number of false oaths taken on different occasions, if amounting to that, would only amount to one offence of perjury. To my mind it is only necessary to state the proposition to dispose of it. It is monstrous to suppose that the law allows any number of perjuries with only one punishment, merely because all the perjuries are in furtherance of the same fraudulent scheme. I am, therefore, of opinion that there is no error upon this record, and that, therefore, the judgment must be for the crown.

Lord Justice BRAMWELL.—I have great doubt whether I ought to express my opinion. I am certain that the writ of error was not allowed without due care by the late attorney-general, and, indeed, I think it was more than warranted by the case in the American court; but the point is as plain a one as ever came before a court of justice. As I understand, the first point was that if a man brings a suit or several suits to establish his right to certain property, that then he may take any number of false oaths on any number of occasions, and yet commit only one offence of perjury. I could hardly have imagined anything so monstrous could have been urged. It was said that it would be monstrous if he were to be punished more than once for the offence. To my mind it would be monstrous if he were not, and I think that if he persisted in swearing false oaths in the matter, he ought not only to be punished again, but punished worse than he was before.

Then the next point was that, as the statute provides that if a person is convicted of perjury, he shall have a sentence not exceeding seven years penal servitude, he cannot have more. The same argument might be used as to any offence, that having once committed it, he may do it again. But what the statute means, surely is that so often as he commits the offence he may have to suffer such a sentence. Then, as to the other point, that the defendant ought to have been sentenced to imprisonment, I doubt whether he could maintain a writ of error for the omission of it. No doubt a man maintained a writ of error on the ground that he ought to have been sentenced, not to be transported, but to be hung; and he is entitled to say that a wrong sentence has been passed, one not warranted by law. But here it is different, and the objection would be, not that the sentence was wrong, but that it was not right enough; and further, it appears to me clear that it was not necessary to impose imprisonment, for the sentence of transportation is only to be "in addition to" imprisonment when imprisonment is adjudged. It is a mere power, nothing more. Then as to the objection on which this writ of error was allowed, that there cannot be cumulative punishments on one indictment exceeding the *maximum* allowed for the offence. The law was laid down differently as to different indictments in *Wilkes's case*, and it is clear that in a case of misdemeanor there may be consecutive sentences succeeding one another. It is said, indeed, they must not exceed the *maximum*. But at common law there was no limitation, except in the general principle laid down in Magna Charta and reaffirmed in the Bill of Rights, that punishments ought not to be "excessive." So that the difficulty at common law would not arise, and there might be a sentence of seven years' imprisonment on one count, and seven years to follow on another. It is said, however, that by reason of the statutory limitation it is otherwise. But except the American case, which goes against all the authorities of our law, there is no authority for that contention, and if it were correct a man might commit repeated offences with impunity. Is he not to be prosecuted for the second until he has suffered his sentence for the first? That would be preposterous. Or is the judgment on the second to be respited until he has suffered the first? Surely, that would be as preposterous. Is not the reasonable and convenient course to be taken which was taken in this case, of trying him on both charges at once, and on con-

viction, sentencing him on both? I am of opinion that such is the proper course in such cases, and that the opposite view is opposed to the authorities, and therefore, that the judgment in this case must be affirmed.

Lord Justice BRETT also concurred.—After listening, he said, to the arguments of Mr. *Benjamin* so little effect did they produce upon his mind that he should have been prepared to give judgment for the Crown. Both these objections, he observed, were now brought forward for the first time after the lapse of six years. As to the first point, that the sentence of penal servitude should have been in addition to one of imprisonment, he thought there was nothing in it, as the enactment was only enabling It was said that on two other trials (those of Tine and Brown), he had taken a different course, and had given a day's imprisonment, but that was only by way of precaution, and not from any opinion on the statute. Then, as to the argument that the perjuries on both occasions were substantially the same, it seemed to him absurd, for they were two distinct offences. It was urged that on the same indictment they ought to have been treated as one offence, and certainly the case of *Wilkes's* was one of two indictments; but he thought several counts in misdemeanor were equivalent to several indictments, and such had been the rule in England for three centuries. It was said that sentences of imprisonment or penal servitude could not succeed each other, but that was certainly contrary to *Wilkes's case*, and in that case the judges laid the law down to be that a judgment of imprisonment to commence after the termination of a previous imprisonment was good in law, and that without any reference to a distinction between "counts" and indictments. That had been the law followed ever since. The statute 7 Geo. 4, gave the power of inflicting successive sentences in cases of felony, even exceeding the *maximum;* and the same had always been the law as to misdemeanors, the statute, as had been said, only extending to felonies what was already the law as to misdemeanors. Then, as to the main question, whether on such a statute the *maximum* should be exceeded by successive sentences, there was no authority, except that of the American case, and he could not understand the ground or reason of the decision, nor, indeed, as it seemed to him, did the judge state any. The statute, in his view, meant that it was to apply to any distinct offence

committed. So that if there were two distinct offences the sentence should be inflicted for each. He therefore thought the judgment right.

The case spoken of in the foregoing opinions as "the American case" is *The People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 556, upon which the Court of Appeals of the state of New York and the Court of Appeals of the High Court of Justice in England appear to be at variance. The whole question hinges seemingly upon the construction of the common law, common to both countries.

The American court contends for the common law as administered in this country prior to the 19th April 1775. The English court contends that the *dicta* of judges, from that date to the present, as well as previously, are to be received as decisive of the common law both past and present. That they are veritable expositions of what the common law ever was and still is. The American court rejects those *dicta*, subsequent to 1775, as no binding authority upon American courts of law. Abstractly they are right. Doubtless, whatever be the common law of England at the present day, and whatever it may have been since the severance of the two countries, can have no bearing on American judicature unless it be in accordance with the common law as it existed in both countries in April 1775. Practically such *dicta* are of essential service, and invaluable as aids in enabling the judicial mind to construe the common law as it has existed from time immemorial to the present day, giving the English judges the ordinary credit of having applied it under varying and in some instances novel circumstances to meet the ever changing conditions of complicated crimes and systematic delinquencies unknown in the less subtle and less sophisticated ages of society.

It may well be, as was said by Lord DENMAN, in *O'Connell* v. *The Queen*, 11 Cl. & Fin. 375, that in old times the indictment consisted of a single count, in which case there could be but one judgment and one penalty, and the "device of inserting many counts" may have originated in the endeavor "to avoid a variance," but "did not change the law governing at the trial." (The words of an eminent counsel in another case, quoted by ALLEN, J., in the *Tweed Case*.)

Here, however, was the first departure from the original simplicity of one count. The only limitation to be found in the books, authorizing a joinder of different offences in the same indictment, is that they must be of the same grade and require the same judgment. Then arises the question, if there are separate convictions on separate counts, must the judgments be concurrent or may the sentences be cumulative? It is admitted that if these same misdemeanors were made the subjects of different indictments, and a conviction was obtained in each, the sentences might be cumulative. Why not then, if for the sake of saving much time and money, both to the public and the defendant, and certainly much more distress and harassing to the latter, may they not be cumulative if tried in one indictment? The only valid reason appears to be that the defendant is thus limited in his challenges. And this may form a good ground of objection in New York state, where peremptory challenges are allowed in felonies and misdemeanors alike. But in England no peremptory challenges are allowed in misdemeanors, therefore that objection does not hold in that respect in England. But yet, even there, we apprehend the defendant might derive some advantage by being tried by different juries for the separate misdemeanors, the same jury convicting in one case having a natural bias to convict in

the others, especially where the evidence is of the same character if not in other respects identical. But this objection cuts both ways. The same jury acquitting in one case would have a natural bias to acquit in all. This, therefore, is rather an objection *in limine*, *i. e.* to the trial of more than one misdemeanor upon one indictment. Granted that in the interests of both the prosecution and the defendant the including of several misdemeanors in one indictment is on the whole desirable, why should not cumulative punishments follow convictions for cumulative offences? To hold otherwise is to subject the defendant, in case of acquittal on the first indictment of one count, to the harassing ordeal of standing several subsequent trials for the remaining charges, when, if convicted on more than one indictment, he would still be liable to suffer cumulative penalties. It is true that as a general rule in the case of felonies, with the single exception of *distinct* acts of stealing, not exceeding three, that may have been committed by the prisoner against the same person within the space of six months (14 & 15 Vict., c. 100, § 16), the prisoner can be tried for only one felony on the same indictment, but this is, as we have before observed, because otherwise he would be deprived of his right of peremptory challenges which he does not possess in cases of misdemeanors. And yet, we apprehend, even in misdemeanors he might, if tried on separate indictments and convicted on the first, challenge the array for cause in the second and subsequent indictments, that cause being, if arraigned before the same jury, that the jury might be prejudiced by their previous verdict, and had already pronounced adversely to him on much the same state of facts (Archbold's Crim. Pl.; Bouvier's Law Dic., tit. *Challenge*, 4-2; Roscoe's Crim. Ev.); for if the respective misdemeanors are dissimilar the prosecution may be put to its election, or the judge in his discretion may quash the indictment: Per BULLER, J., in *Young* v. *The King*, 3 Term R. 98. At all events the striking of different juries for the separate indictments would effectually disarm the defendant, and afford him no excuse or justification for challenging the array.

It appears, that prior to 1847, the right of peremptory challenges on trials for misdemeanors was not allowed in the state of New York, and hence, as Mr. Justice ALLEN observes, "the dicta apparently contradicting the practice found in our reports, prior to that time, may well have followed the English cases." By the laws of 1847, c. 134, however, any one put on trial for a misdemeanor in a court of Oyer and Terminer, has the right to challenge peremptorily, five of the persons drawn as jurors for such trial.

Now, this statute effectually changed the practice of including more than one misdemeanor in the same indictment, if indeed that practice ever prevailed in this country, except by way of inserting many counts, to avoid a variance. "There is no objection," observes Mr. Justice ALLEN, "to stating the same offence in as many different ways as may be deemed expedient."

"The usage," continues the same learned judge, "of employing numerous counts to guard against a possible variance between the allegation and the proof, is the sole cause of any misapprehension concerning this matter, which may appear in some few judicial opinions. Because there may be many counts in an indictment or declaration, and each on its face must be for a different offence, it has been hastily assumed that distinct and different transactions occurring at different times and places, and constituting so many different offences, may be given in evidence on the trial of an indictment or a penal action. The few cases that are to be found, giving an apparent sanction to this notion, are not sufficient to establish it:" *People ex rel.*

Tweed v. *Liscomb*, 60 N. Y. 581. At all events such can only be treated as one offence. "If," said the same learned judge, "there could be but one punishment or punishment as for a single misdemeanor, irrespective of the number of offences proved, and of which he could be convicted by the verdict of the jury, although he might be embarrassed in his defence and prejudiced with the jury, the court could possibly see that no great harm could come to the accused by a joinder of offences. If the rule has this limit, then there is reason for the limitation, as found in the books, that to authorize a joinder of different offences, they must be of the same grade, and require the same judgment. If judgment may be distributive and cumulative, it is difficult to see why there should be an identity as to their character and extent of punishment:" Id. 577. If there be not an identity as to their character and extent of punishment, even in England the judges may, at their discretion, put the prosecutor to his election. See observations of JAMES, L. J., in the *Tichborne case*. But yet there appears no valid reason why in England, where no peremptory challenges are allowed in trials for misdemeanors, several offences of a like character and subject to a like punishment should not be tried upon one indictment, and yet the punishment be distributive and cumulative.

The right of peremptory challenges existing in the state of New York, as given by modern statute, however, is a complete answer to the supposed collision or contradiction between the judgment of the New York Court of Appeals and that of the English High Court of Justice Court of Appeal. The two opinions are perfectly reconcilable. Whether as a matter of practice, a defendant, charged with several misdemeanors in one indictment in an English criminal court, be in a worse or better position than a defendant liable to be tried upon several indictments, though at different times and before different justices, in the state of New York, is a point that it is not within the province of the writer of this note to determine. But it is satisfactory to think that the respective judicial opinions, if not in perfect unison, are justified in the opposite conclusions at which they have arrived, by the statutory provision existing in one country, but unknown in the other; and yet the sacred principles of the *lex non scripta* have, in no sense, been either misunderstood or misapplied in either case. Whether previous to the year 1847, more than one misdemeanor could be substantially included in the same indictment in different counts, so that an accused, if convicted on the separate counts, might be punished by distributive and cumulative sentences, exceeding in the aggregate more than the full meed of punishment for any one of the offences charged, is a question that, for the purpose of the present decision, is of no practical importance. But at all events, the statute of the state (2 R. S. 700, § 11), "directing that upon the conviction of a person of two or more offences, before sentence shall have been pronounced upon him for either, the imprisonment to which he shall be sentenced upon the second or subsequent conviction shall commence at termination of the first or second term of imprisonment, as the case may be, has respect to separate convictions upon distinct trials, and neither affirms nor disaffirms the practice pursued in this case, and does got sustain it by implication or otherwise:" per ALLEN, J., in *People ex rel. Tweed* v. *Liscomb*. "*Nemo bis punitur pro eodem delicto*," is the maxim that governs the practice in both countries. The means of effecting this safeguard alone create the difference in the administration of the principle.

Congress has provided by statute for the joinder of several charges, against the same person in the same act or transaction, or for two or more acts or transactions of the same class of crimes or

offences in one indictment, in several counts, but no provision is made for several judgments on one record. 10 U. S. Stat. at Large 162; U. S. Rev. Stat. § 1024.

Upon a conviction of one Albro, in the Circuit Court of the United States, under this statute, the court held, Judge NELSON announcing the decision of himself and his associate, Judge HALL, that the act did not change the common law as it existed in the state of New York, and was administered by the United States courts, sitting in that state, and that the government was not entitled to a judgment upon a conviction of a prisoner of several offences under one indictment containing distinct counts, except as for a single offence. Quoted by ALLEN, J., *In re Tweed.* In Massachusetts, there is a similar statute, with the additional provision, that successive convictions may be had, and limiting the aggregate term of imprisonment, under any one indictment. (Stat. of 1861, c. 181.) In a gigantic case, like that of Tweed's, where two hundred offences were charged, the apparition of two hundred separate indictments might well frighten any court out of its propriety, but surely the selection of some half dozen of the most prominent charges, upon which convictions might reasonably be expected would satisfy the ends of justice, whose object is the vindication of law, the not immoderate punishment of the offender, and certainly not the infliction of a vindictive and unreasonable sentence.

It is, certainly, much in favor of the decision in the *Tweed case* that, even in England, it required a statute (7 Geo. 4) to enable the court to inflict successive sentences in cases of felony, exceeding the *maximum* allowed in any one case. (See Lord J. BRETT'S opinion.) At common law this could not be done. No such corresponding statute relates to misdemeanors. And yet this (the *Tichborne case*) was a common-law indictment.

Although under comparatively modern statutes in England, different felonies may, in some instances, be charged in different counts in the same indictment, they are such as invariably arise out of the same transaction, with the single exception before mentioned, of not exceeding three acts of stealing, committed within six months, against the same individual. (24 & 25 Vict. c. 96, s. 5.) Those to which we refer are cutting and wounding, with intent to kill and murder; with intent to disfigure or disable; with intent to maim; with intent to do grievous bodily harm; or, with intent to resist his lawful apprehension. And even under such an indictment, the prisoner may be convicted as for a misdemeanor of unlawfully wounding (14 & 15 Vict. c. 19, s. 5 and 27 & 28 Vict. c. 47); yet it is obvious, from the graded nature of the offences, he can be convicted only upon one count, as it is only through a failure of evidence to satisfy the *major* charge or charges that he may nevertheless be convicted of the *minor*. There can, therefore, be but one judgment and one statutory punishment, according to the degree of crime of which he is convicted. It is only supererogatory to say that at common law, upon an indictment for murder, he may be convicted of manslaughter; and in an indictment for forgery, a count may be added for uttering, and he may be convicted of both. Here we have an instance of two distinct felonies, as it well might be, and often is the case, that one person forges the instrument and another person utters it, and frequently at different times and on separate occasions. And yet if one person is convicted of both acts, he suffers but one punishment. It may be penal servitude for life, in which case, of course, there could be no cumulative punishment. But it may be, in the discretion of the judge, penal ser-

vitude for not less than five years (27 & 28 Vict. c. 47, s. 2), or the alternative of not exceeding two years imprisonment with hard labor, and with or without solitary confinement for stated periods of not more than three months, in the aggregate, for the full period of two years; but no one ever heard of a sentence of two periods of penal servitude (though one lengthened period may be awarded), or of two sentences of imprisonment, exceeding in the aggregate the extreme limit of two years, with, perhaps, an additional three months of solitary confinement. In practice, the prisoner is formally convicted on only one count of the indictment, although he may be guilty on both. The punishment is the same on each count, but the felonies, though distinct, are virtually treated as one, the second count being inserted to avoid a variance. This seems somewhat analogous to the *Tweed case*. But these departures from the practice of the common law are all authorized by statutory enactments. So it is only by express statute that, upon an indictment for a felony, a person may be convicted of a misdemeanor and *vice versa*. (14 & 15 Vict. c. 100, s. 9.)

It is somewhat difficult to discover why, in a case of misdemeanor, a defendant should be placed in a worse position than in a case of felony; why he may be convicted on the same indictment of any number of misdemeanors and be liable to cumulative punishments, exceeding in the aggregate the extreme penalty for any one such misdemeanor; and except by special legislative enactment, he can only be tried for one felony upon one indictment, except it be a felony such as murder, which may be reduced to one of inferior degree, such as manslaughter, unless upon the principle, that by including more than one charge of felony in the same indictment the prisoner's right of peremptory challenges would be affected, and the aggregate number of such reduced. And yet it has been laid down by high authority that such right of peremptory challenges was originally given by the common law *in favorem vitæ*, and most, if not all, felonies originally were *capital:* Co. Litt. 156; 4 Bl. Com. 352; Com. Dig. (Challenge) (C); *Gray* v. *R.*, 11 Clk. & Fin. 447; though now extended to all felonies. (6 Geo. 4, c. 50, s. 29, limiting the number of peremptory challenges to twenty.)

Such appeared to be the pivot upon which the decision in the *Tichborne case* has turned, although it is not expressly stated so in the judgment. In the *Tweed case*, on the other hand, the judges are very explicit in pointing out the injustice a defendant would sustain in thus being deprived of his right of peremptory challenge, which, in the state of New York, is allowed in felonies and misdemeanors alike, and though they more than once refer to and cite the statute creating, or rather extending this privilege to misdemeanors, and intimate that such may make all the difference between the common law as administered in that state and in England, yet Lord Justice JAMES is unable to discover any reason upon which their judgment is based, although he admits there *must be some difference between the law in the state of New York and the law as received and administered in England*, his lordship's words being: "It seems to me that the judgment of the American court proceeded upon a view different from that of our courts." Again, the English judges speak of *Tweed's case* as the "American case," and the court, as the "American court," as if indeed the decision were that of the Supreme Court of the United States, instead of merely a decision of the Court of Appeal of a single state, based upon a statute of the state legislature, and, therefore, no binding authority on other states.

HUGH WEIGHTMAN.

Sept. 1880.